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***CORRESPONDENCE MEMORANDUM***

**DATE:** November 07, 2005

**TO:** Employee Trust Funds Board  
Teachers Retirement Board  
Wisconsin Retirement Board

**FROM:** Robert Weber, Chief Counsel

**SUBJECT:** Legislative Proposal: Hearsay Evidence in Appeals

This proposal would allow the fact-finder hearing administrative appeals for benefit plans under ch. 40 to have the discretion to determine what evidence is reliable and, when the circumstances warrant, would allow reliance upon that evidence. The proposal will preserve the Legislature's intent of keeping administrative hearings more informal than court proceedings. The language proposed in the attachment will:

- Add a new provision (WIS. STAT. § 40.085) within ch. 40 to establish that the appeal procedures for the benefit plans may be established by rule and that hearsay evidence bearing inherent guarantees of reliability and trustworthiness may form the basis for factual findings in those appeals. However, in the interest of fairness, advance notice to opposing parties of the hearsay evidence and the opportunity to challenge the hearsay are required.
- Revise WIS. STAT. § 40.63 to delete existing references in the disability annuity statute to the administrative hearing procedures under ch. 227 in order to separate appeals related to benefit plans under ch. 40 from future court decisions interpreting the ch. 227 administrative hearing procedures.

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***PROPOSED BILL TEXT***

**SECTION 1.** 40.085 of the statutes is created to read:

**40.085 Administrative appeals.** (1) PROCEDURES. The procedures for hearing administrative appeals authorized in this chapter may be established by administrative rule approved by the board having jurisdiction over the benefit plan at issue.

(2) EVIDENCE, HEARSAY. In an appeal authorized in this chapter of a determination made by the department, findings of fact may be based on hearsay, provided the hearsay evidence bears inherent guarantees of reliability and trustworthiness, the opposing party has full notice of the evidence and the opposing party has the opportunity to challenge the hearsay. Hearsay with inherent guarantees of reliability and trustworthiness includes evidence admissible in court under ss. 908.01 (4), 908.03 (1) to (6) and (7) to (24), 908.045, 908.05 and 908.06 as well as authenticated hospital records and physician certifications in accord with rules approved by the board.

**SECTION 2.** 40.63 (5) of the statutes is amended to read:

40.63 (5) The department shall make a report based on the evidence prescribed in subs. (1) to (4) as to whether a disability benefit shall be granted and the department shall submit the report to the teachers retirement board for teacher participants and to the Wisconsin retirement board for participants other than teachers. A copy of the report and notice of the date that the report was presented, or will be presented, to the appropriate board and the board's name, shall be mailed to the applicant and to the applicant's former employer. Either the applicant or the employer may request a hearing under s. 227.44 rules promulgated with the approval of the teachers retirement board and Wisconsin retirement board to contest the department's determination by filing a timely appeal with the appropriate board. If a request for a hearing is not timely filed, and the appropriate board does not disapprove the department's determination or request additional information within the time allowed for filing appeals, the report shall be final. If the board requests additional information, the report shall be final 30 days after the board's receipt of the requested information unless the board disapproves the report. If the report is disapproved, notice of the board's action shall be sent to the applicant and the applicant's former employer. Either the applicant or the employer may contest the board's action by submitting a written request for a hearing ~~under s. 227.44~~ to the appropriate board within 30 days following the date on which the notice of the board's action was mailed to the applicant or the employer.

**SECTION 3.** 40.63 (9) (d) of the statutes is amended to read:

40.63 (9) (d) If the department terminates a disability annuity under this subsection, the department shall make a report which shall include the department's determination and the reasons for the determination. The department shall submit the report to the teachers retirement board for teacher participants and to the Wisconsin retirement board for participants other than teachers. A copy of the report and notice of the date that the report was presented, or will be

presented to the appropriate board, and the board's name, shall be mailed to the affected annuitant. An annuitant may request a hearing ~~under s. 227.44~~ to contest the department's determination by filing a timely appeal with the appropriate board. If a request for a hearing is not timely filed, and the appropriate board does not disapprove the department's determination or request additional information within the time allowed for filing appeals, the report shall be final. If the board requests additional information, the report shall be final 30 days after the board's receipt of the requested information unless the board disapproves the department's determination.